No. 83-361

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM M. ERLBAUM, a Judge of the Criminal Court of the City of New York, New York County,

Petitioner,

against

ROBERT M. MORGENTHAU, District Attorney of New York County,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

On June 7, 1983, the New York State Court of Appeals unanimously held that persons charged with prostitution in New York City may constitutionally be tried, as provided by Statute, by a judge rather than a jury, because those

defendants face a maximum of ninety days in jail under New York state law. *Matter of Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143 (1983).

Petitioner William M. Erlbaum now seeks a writ of certiorari to review the judgment of the New York Court of Appeals.

Statement of the Case

On November 9, 1979, Carol Link and Debra Meltsner were arrested in a "leisure spa" known as the "Gramercy East," on complaints sworn to by two undercover New York City policemen. According to those complaints, each defendant had agreed to engage in a variety of sexual acts for a stated fee. The defendants were, therefore, charged with the class "B" misdemeanor of Prostitution, punishable under New York Penal Law Section 230.00 by no more than 90 days in jail.

Section 340.40(2) of the New York Criminal Procedure Law provides that New York City defendants charged with Class "B" misdemeanors shall be tried before a judge, not a jury. Nonetheless, although they faced far less than six months' imprisonment, the defendants moved for a jury trial, claiming that prostitution, by its nature, is a "serious" crime under the Sixth Amendment to the United States Constitution. On February 23, 1981, New York Criminal Court Judge William M. Erlbaum granted the motion for a jury trial. *People* v. *Link*, 107 Misc.2d 973 (N.Y. Crim. Ct. 1981).

In his opinion, the petitioner recognized that this Court's most recent cases had discussed a "fixed dividing line of

six months'' imprisonment between ''petty'' offenses and ''serious'' crimes. Nonetheless, the petitioner concluded that prostitution—''no matter how lightly punished''—is an ''inherently serious'' crime. Appendix at 66a-67a. Accordingly, the petitioner held that the Sixth and Fourteenth Amendments required a jury trial, and declared Section 340.40(2) of the New York Criminal Procedure Law unconstitutional. Appendix at 67a.

On April 17, 1981, Robert M. Morgenthau, District Attorney of New York County, brought an action in New York Supreme Court to review the petitioner's order. On November 10, 1981, Justice Francis N. Pecora concluded that prostitution was not a ''serious'' offense within the meaning of the Sixth Amendment, and therefore declared constitutional the New York statute requiring non-jury trials for charges of prostitution, which carries a maximum sentence of ninety days in jail. *Matter of Morgenthau* v. *Erlbaum*, 112 Misc.2d 30 (N.Y. Sup. Ct. 1981).

Petitioner Erlbaum appealed that judgment to the Appellate Division, First Department, of the New York Supreme Court. On September 16, 1982, that court unanimously affirmed the declaratory judgment, without opinion. *Matter of Morgenthau* v. *Erlbaum*, 89 A.D.2d 1062 (1st Dept. 1982). The petitioner then appealed to the New York Court of Appeals, again asserting that prostitution is so ''serious'' a crime that a jury trial is constitutionally mandated, notwithstanding that the maximum penalty is only ninety days in jail. On June 7, 1983, the Court of Appeals rejected that argument. *Matter of Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143 (1983).

Writing for a unanimous court, Chief Judge Lawrence H. Cooke observed that this Court's recent decisions had

emphasized the "objective criterion" of the maximum sentence "to the exclusion of virtually everything else" in determining whether a crime is "serious" for Sixth Amendment purposes. Appendix at 21a. On the basis of this clear emphasis, the Court of Appeals concluded that this Court had adopted that "objective" dividing line. The Court of Appeals noted that the only alternative was a "subjective decision" by individual judges about the "history" and the "legal, moral, and psychological implications" of a particular crime. Appendix at 20a-21a. The Court of Appeals reasoned that this "subjective" evaluation was inadequate because it could vary "from county to county, town to town, or even court to court." Appendix at 23a. More importantly, the court concluded that, in determining the maximum penalty, the Legislature "must be presumed to have weighed public opinion and history" and all the other factors Judge Erlbaum had re-evaluated on his own. Appendix at 23a-24a. In other words, the maximum penalty itself is the "objective" reflection of the Legislature's —and the community's—judgment about the seriousness of the crime. Appendix at 22a-23a.

Reasons for Denying the Writ

1. The Court of Appeals of the State of New York concluded that this Court had adopted an objective and "fixed dividing line" between "serious" crimes that require a trial by jury and "petty" offenses which do not. Appendix at 22a. Contrary to the petitioner's assertion, that holding was based on the only fair reading of this Court's most recent decisions interpreting the Sixth Amendment right to a jury trial. For example, in its clearest discussion of the appropriate means for making this constitutional de-

termination, this Court concluded that "the severity of the penalty authorized . . . is the relevant criterion," because "the Legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank* v. *United States*, 395 U.S. 147, 149 (1969). Certainly, in determining whether a state crime is "serious" for constitutional purposes, this Court has focused exclusively on the maximum penalty carried by that crime. Indeed, this Court stated unambiguously in *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974), that:

> Our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes. *Id.* at 512.

Nor has this clear statement caused "substantial confusion" in the lower courts, as the petitioner now suggests. Petition for Certiorari at 38. Notably, the petitioner has pointed to no state court decision that has rejected this objective dividing line. On the other hand, as he concedes, five state courts, including the New York Court of Appeals, have concluded that the maximum penalty is the only relevant criterion for determining whether the Federal Constitution mandates a jury trial for a state crime.* Petition for Certiorari at 33-34. Indeed, the only case the petitioner has advanced that does apply other standards to a state crime is a federal district court decision that does not even mention, let alone analyze, this Court's decision in *Codispoti*.

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* *Matter of Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143 (1983); *City of Tampa* v. *Ippolito*, 360 So.2d 1316 (2d Dist. Fla. 1978); *State* v. *Young*, 194 Neb. 544, 234 N.W.2d 196 (Neb. 1975); *Commonwealth* v. *Mayberry*, 327 A.2d 86 (Pa.Sup.Ct. 1974); *State* v. *Owens*, 54 N.J. 153, 254 A.2d 97 (N.J.Sup.Ct. 1969), *cert. denied*, 396 U.S. 1021 (1970).

Brady v. *Blair*, 427 F.Supp. 5 (S.D.Ohio 1976). This single opinion hardly creates the kind of conflict which requires resolution by a grant of certiorari.*

Thus, contrary to the petitioner's suggestion, this Court's clear emphasis on the maximum penalty in its recent cases has been correctly analyzed and followed by virtually every court to apply the federal constitutional mandate to a state offense. There is no reason for this Court to grant certiorari simply to reaffirm its previous statements.

2. Even assuming that factors other than the maximum sentence should be considered in determining whether a jury trial is required, this case still would not warrant review. Even under the older theories used by this Court before the Sixth Amendment was applied to the states, prostitution simply cannot be deemed a "serious" offense. For example, one of the criteria most often cited in those older cases was whether a crime was indictable at common law. *Callan* v. *Wilson*, 127 U.S. 540, 555 (1888); *see also District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); *District of Columbia* v. *Colts*, 282 U.S. 63 (1930). As the petitioner has conceded, prostitution was not (Appendix at 53a, n.19).

The other factor most frequently mentioned by the early cases was whether the offense involves "moral turpitude." *See, e.g., District of Columbia* v. *Colts, supra.*

* Nor have the federal circuit courts imposed any other standards when reviewing the constitutionality of state statutes. Both the Sixth and Ninth Circuit cases on which the petitioner relies involved the appropriate standard to be applied in federal court to federal crimes. *United States* v. *Craner*, 652 F.2d 23 (9th Cir. 1981); *United States* v. *Stewart*, 568 F.2d 501 (6th Cir. 1978); *United States* v. *Sanchez-Meza*, 547 F.2d 461 (9th Cir. 1976). *See also United States* v. *Woods*, 450 F.Supp. 1335 (D. Md. 1978).

Notably, the petitioner does not contend that prostitution involves "moral turpitude." Indeed, the courts in the District of Columbia, which, as federal courts, were bound to apply this analysis, have concluded that prostitution does not involve the kind of moral turpitude that gives rise to a right to a jury trial. *Bailey* v. *United States*, 98 F.2d 306 (D.C. Cir. 1938); *Marshall* v. *United States*, 302 A.2d 746 (D.C. 1973); *Austin* v. *United States*, 299 A.2d 545 (D.C. 1973).

Thus, even under these older theories, prostitution must be considered a "petty" offense. Certainly, New York State has always treated prostitution as a "petty" offense. From earliest colonial times, New York's laws provided that charges of prostitution should be tried to a judge, not to a jury, Frankfurter and Corcoran, *Petty Federal Offenses and Trial by Jury*, 39 Harv. L. Rev. 917, 944-945 (1926) ("Frankfurter and Corcoran"). After the Revolution, New York retained the colonial laws providing for bench trials in cases involving prostitution. Chapter 40 laws (1795); Frankfurter and Corcoran, 39 Harv. L. Rev. at 987. Under the predecessor to the present Penal Law, prostitution was simply a form of vagrancy, a "noncriminal" offense punishable by up to six months' imprisonment. New York Code Crim. Proc. §§ 887(4), 892.

True, as the petitioner notes, 43 states authorize a jury trial for this offense. However, this statistic hardly implies that prostitution is universally regarded as a "serious" crime. In fact, seventeen of those 43 states grant jury trial simply because, under state law, a jury trial is permitted for every offense, whether it is "serious" or not. The more significant statistic reveals that half of the states authorize

a penalty of below the constitutionally mandated dividing line of six months. Moreover, of the twenty-five other states, many impose sentences of more than six months only for recidivists. *See, e.g.* Michigan Comp. Laws Ann., §§ 750.448, 750.451; South Carolina Code, §§ 16-5-90, 16-15-110.

Plainly, then, there is no "uniform" national moral judgment about the seriousness of the crime of prostitution. Nonetheless, the petitioner attempted to impose "uniformity" by indulging in a "historical" analysis of his own. He remarked, for example, that prostitution was proscribed "in Biblical times" (Appendix at 55a, n.20). However, many of the other offenses deemed "petty" when the Constitution was adopted, like petty larceny, sabbath-breaking, and profanity were also proscribed in Deuteronomy.* Frankfurter and Corcoran, 39 Harv. L. Rev. at 983-988. Similarly, while it may be true, as the petitioner pointed out, that prostitutes are being stoned to death today in Teheran (Appendix at 55a, n.21)— so serious is this offense considered there—penal practices in the Republic of Iran hardly provide an appropriate gauge of New York's community standards.

The petitioner also suggested that accused prostitutes are entitled to a jury trial because, if convicted, they will be exposed to "the opprobrium of the 'fallen woman'" (Appendix at 55a-56a). Not a single case on which he relies supports a theory that social "opprobrium" or collateral social consequences of a conviction can trigger the constitu-

* *Compare* Deuteronomy, chapter 5, verse 19 "Thou shalt not steal." *with* 4 Colonial Laws of New York 969 (1768); Deuteronomy, chapter 5, verse 12 (observation of the sabbath) *and* Deuteronomy, chapter 5, verse 11 (swearing), *with* 1788 Laws Chapter 42 (Sabbath breaking, profanity).

tional right to a jury trial. In any event, his opinion once again illustrates the dangers of allowing a single judge to substitute his own view of the "seriousness" of the sociological and psychological impact of an offense for the Legislature's view. As noted by Justice Pecora, the first of twelve State judges to consider and reject the petitioner's theory, Erlbaum's conclusions about "society's perception" of prostitution are, at best, "highly debatable." *Matter of Morgenthau* v. *Erlbaum*, 112 Misc.2d at 35.

To support his side of the debate, the petitioner has culled epithets and negative comments about prostitutes from a variety of sources (Appendix at 55a-56a). However, if some judges once considered prostitutes "malodorous and evil characters" (Appendix at 58a), many judges today clearly do not. If "great masses of people" believe that prostitution leads to other forms of criminal conduct (Appendix at 58a), many other people surely do not. For example, the American Civil Liberties Union—of counsel to the petitioner—has for years argued that prostitution should be decriminalized altogether. *See* AMERICAN CIVIL LIBERTIES UNION, STATEMENTS OF POLICY, No. 210 (undated but referring to Board Minutes of September 27-28, 1975, April 10-11, 1976, and March 5-6, 1977). Thus, the conclusion that negative public opinion about prostitutes is universal is, at best, outdated.

Accordingly, even if other factors were relevant to determine whether a crime is "serious" for this constitutional purpose, there is no need to grant review here because prostitution does not satisfy any of the relevant criteria.

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In sum, this Court has established a fixed dividing line, based on the maximum authorized penalty, between "serious" crimes, which require trial by jury, and "petty" offenses, which do not. There is neither reason nor need to grant certiorari to reaffirm this already clear rule.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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